Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED *

1. Whether a pretrial ruling of the district court, refusing to dismiss a superseding indictment on the ground of prosecutorial vindictiveness, is subject to an interlocutory appeal by respondents.

2. Whether the return of a superseding indictment adding some counts and deleting others, the net effect of which was to reduce the penalties to which respondents would be exposed in the event of conviction, constituted vindictive prosecutorial conduct violating respondents' rights under the Due Process Clause.

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* Additional respondents in this case are Fredric Michael Bernstein and Terrance Quatkemeyer.

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HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 646 F.2d 384. The order of the court of appeals denying rehearing (App. C, *infra*, 14a) is not reported. The summary ruling of the district court (App. D, *infra*, 15a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 13a) was entered on May 26, 1981. A petition for rehearing was denied on October 26, 1981 (App. C, *infra*, 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

During pretrial proceedings in the United States District Court for the Central District of California, respondents moved to dismiss a superseding indictment on the ground that it had been vindictively brought in response to their successful motion to transfer venue from the Eastern District of Kentucky to the Central District of California. Following a hearing, the district court refused to dismiss the superseding indictment. Respondents thereafter took an interlocutory appeal, invoking 28 U.S.C. 1291 as the basis for the court of appeals' jurisdiction. The court of appeals reversed, treating the pretrial order as collateral and therefore "final," and finding apparent vindictiveness in the filing of the superseding indictment. App. A, *infra*, 1a-5a, 12a.

1. Respondents originally were charged in the United States District Court for the Eastern District of Kentucky with conspiracy to smuggle motor cars into the United States, in violation of 18 U.S.C. 371.[1] In addition, respondents were charged with one substantive count of receiving an unlawfully imported vehicle, in violation of 18 U.S.C. 545. The maximum penalty for conviction on both of these counts would have been ten years' imprisonment and a $20,000 fine.[2] App. A, *infra*, 2a & n.1.

Following the return of the indictment, respondents moved for a change of venue to the Central District

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[1] The conspiracy count, which was 11 pages in length, alleged 53 separate overt acts, including the submission of false statements to a customs officer in connection with the importation of four sports cars (App. E, *infra*, 16a).

[2] 18 U.S.C. 371 provides for a maximum penalty of five years' imprisonment and a $10,000 fine. 18 U.S.C. 545 prescribes the same penalty.

of California. Before the venue motion was heard, the prosecutor and customs agent informed respondents that "there would be ensuing additional counts and/or indictments" if the case was transferred to the Central District of California (App. A, *infra*, 3a n.2). Respondents nonetheless persisted in their motion and a change of venue was ordered (*id.* at 3a).

After transfer of the case, respondents were rearraigned in the United States District Court for the Central District of California. Four days later, the successor prosecutor filed a superseding indictment (App. A, *infra*, 3a) charging respondents with the two original counts and with four additional substantive counts, which could not have been charged in the Kentucky indictment. The new substantive counts alleged the making of false statements to customs officers, in violation of 18 U.S.C. 542.[3] The superseding indictment exposed respondents to potential penalties of 18 years' imprisonment and $40,000 in fines (App. A, *infra*, 3a).[4] However, on May 8, 1980, the successor prosecutor voluntarily obtained dismissal of the conspiracy count and two of the false statement counts (*id.* at 4a; App. F, *infra*, 19a-20a). As thus restructured, the indictment exposed respondents to maximum penalties of nine years' imprisonment and $20,000 in fines—*i.e.*, a *lower* penalty exposure than

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[3] The four false statements had been described as overt acts in the conspiracy count of the original indictment (see App. A, *infra*, 3a n.3). Due to applicable venue limitations, the four false statements could not have been charged as substantive offenses in the Eastern District of Kentucky. See App. E, *infra*, 16a-17a.

[4] In addition to the ten years' imprisonment and $20,000 fines to which they were exposed under the original indictment, respondents also faced two-year terms of imprisonment and $5,000 fines on each of the new false statement counts.

that under the original indictment returned in the Eastern District of Kentucky (App. A, *infra*, 8a-9a n.6).

Thereafter, respondents moved to dismiss the superseding indictment on the ground that it manifested prosecutorial "vindictiveness," contrary to the rule announced in *Blackledge* v. *Perry*, 417 U.S. 21 (1974). In response, the government filed a declaration by the successor prosecutor that explained the restructuring of the indictment in the Central District of California. The prosecutor stated that her first contact with the case was when it was assigned to her on April 21, 1980. By April 25, she had concluded that the conspiracy count was unduly cumbersome and that it should be replaced by straightforward substantive counts (App. E, *infra*, 16a-18a). Accordingly, she sought a superseding indictment on that date adding the four false statement counts. At the same time, she sought permission to dismiss the conspiracy count (*id.* at 17a). After obtaining that permission, the prosecutor dismissed the conspiracy count and also dismissed two of the new false statement counts, based on her determination that the conduct charged in those two counts was not aggravated. The prosecutor also stated that the restructuring of the indictment was prompted by her belief that the case should be narrowed and simplified as much as possible "in an effort to save time and effort for everyone" (*id.* at 18a).

Following a hearing, the district court summarily denied respondents' dismissal motion based on a theory of prosecutorial vindictiveness (App. D, *infra*, 15a). However, it stayed the scheduled commencement of trial in order to allow respondents to

appeal the denial of their motion to dismiss (App. A, *infra*, 4a). Trial in this case has been suspended from that date (May 19, 1980) to the present time.

2. The court of appeals assumed jurisdiction of respondents' interlocutory appeal and reversed the district court's ruling on the issue of vindictive prosecution (App. A, *infra*, 1a-12a). Relying on its previous decision in *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980), the court held that the district judge's pretrial order is "immediately appealable" (App. A, *infra*, 5a).

Turning to the merits, the court of appeals found that the "threat" of increased charges by the prosecutor in Kentucky established a due process violation even though the superseding indictment was obtained by another prosecutor in another district and even though there was no suggestion that the successor prosecutor had acted for vindictive reasons (App. A, *infra*, 5a-7a). Moreover, because a "threat" was involved, the court of appeals held that, unlike other cases in which vindictiveness claims were asserted by criminal defendants, the government was precluded from rebutting any appearance of vindictiveness by an explanation of non-vindictive reasons for bringing the new charges (*id.* at 7a-8a). Finally, the court found that it was irrelevant that the superseding indictment, as modified by the voluntary dismissal of several counts, carried a lesser penalty than the penalty under the original indictment. Even though the total penalty was reduced, the court speculated that respondents might still suffer some prejudice because they would be required to defend against three counts instead of two and because the government might have a better chance of obtaining a conviction under the streamlined superseding indictment (*id.* at 8a-10a). Accordingly, the court

ordered dismissal of the superseding indictment and reinstatement of the original indictment (*id.* at 10a-12a).

The government filed a petition for rehearing with suggestion for rehearing en banc and advised the court of appeals that its ruling on appealability was in direct conflict with that of two other circuits. Copies of the D.C. Circuit's recent decision in *United States* v. *Brizendine*, 659 F.2d 215 (1981), and the Fifth Circuit's decision in *United States* v. *Gregory*, 656 F.2d 1132 (5th Cir. 1981), were furnished to the court of appeals. Despite the holding of those circuits that pretrial rulings on claims of vindictive prosecution are not appealable on an interlocutory basis, the court of appeals denied rehearing (App. C, *infra*, 14a).

REASONS FOR GRANTING THE PETITION

1. *a.* This case presents an important and recurring question concerning the jurisdiction of courts of appeals under 28 U.S.C. 1291 to entertain interlocutory appeals in criminal cases. Since its decision in *United States* v. *Griffin*, 617 F.2d 1342 (1980), the Ninth Circuit consistently has held that pretrial orders of district courts denying motions to dismiss criminal charges on grounds of prosecutorial vindictiveness are immediately appealable under the "collateral order" exception to the final judgment rule (see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)). *Griffin* concluded that the right to be free from prosecutorial vindictiveness "would be irreparably lost if appellate review had to await the final outcome at trial." 617 F.2d at 1346. It also dismissed the government's prediction that allowances of immediate review would "open the flood-

gates of interlocutory appeals of due process claims." *Ibid.*

Since the Ninth Circuit announced its decision in *Griffin*, however, two other circuits have considered the same question and have rendered decisions that directly conflict with that of the Ninth Circuit. Moreover, actual experience with the *Griffin* rule in the Ninth Circuit clearly shows that it does in fact "open the floodgates" of interlocutory appeals and seriously obstructs the progress of criminal prosecutions in district courts throughout the circuit.

The Ninth Circuit's expansive rule of appealability is in direct conflict with that recognized in every other circuit that has considered the question. In *United States* v. *Brizendine*, 659 F.2d 215 (1981), the D.C. Circuit held that claims of prosecutorial vindictiveness under the Due Process Clause do not involve any right to be immune from trial and do not require pretrial review because relief in a post-conviction setting is completely adequate to redress any constitutional violation. After stating that *Griffin* was "erroneously decided" (659 F.2d at 220 n.9), the D.C. Circuit explained (*id.* at 222; footnote omitted):

> We decide here that delaying review until after final judgment will not prevent effective relief, if relief is appropriate. * * * If the appellants' due process claims are upheld on appeal after final judgment, the court can provide effective relief by ordering the indictment dismissed as to some or all of the defendants, striking any additional charges that were improperly brought against the accused, requiring correction of the sentence, or reversing and remanding for reindictment and a new trial. Several Courts of Appeal have provided such relief in post-conviction appeals on grounds of vindictive or retaliatory

> prosecution. * * * It is true that post-conviction relief will not spare the defendant the burden of defending himself at trial. [But] [c]riminal defendants have many rights that cannot be vindicated by interlocutory appeal if relief is denied before trial by the District Court.

In light of its review of the experience of the Ninth Circuit under *Griffin* (*id.* at 224-226), the D.C. Circuit stated that "[w]e are not prepared to embark on this frustrating and wasteful path where an appropriate remedy is otherwise available." *Id.* at 226.

The Fifth Circuit reached the same result in *United States* v. *Gregory*, 656 F.2d 1132, 1133-1136 (1981). Concluding that the "reasoning" of *Griffin* is "faulty" (*id.* at 1136), the court ruled as follows (*id.* at 1135-1136):

> Defendants' claim of prosecutorial vindictiveness does not seek to protect a right the special nature of which presents a compelling need for immediate review, and therefore does not fall within the *Cohen* exception [to the final judgment rule]. Defendants fail to establish how "the legal and practical value" of their rights would be destroyed if their challenge to the denial of the motion must await final appeal. Such claims can be and are often heard on appeal from a conviction. * * * In view of the substantial policy in avoiding delay in criminal prosecutions and the availability of an effective review upon appeal from a final judgment, we decline to adopt a rule which would permit as a matter of course immediate appeals from the denial of prosecutorial vindictiveness claims.[5]

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[5] See also *United States* v. *Loux & Blecker*, No. 81-5036 (4th Cir. May 22, 1981), holding that "the order of the district court denying the appellants' motion to dismiss the

b. The practical problems created by the *Griffin* rule in criminal prosecutions in the Ninth Circuit are substantial. As we point out in our petition for certiorari in *United States* v. *Goodwin*, cert. granted, No. 80-2195 (Nov. 30, 1981),[6] vindictiveness claims are now raised with ever increasing frequency in criminal cases when ever prosecutors take some adverse action after an accused exercises any of a wide range of procedural rights (see Pet. 12-13 n.6). Moreover, as is apparent from the facts of this case, even the restructuring of an indictment without any increase in the severity of the charges may be enough to trigger a claim of prosecutorial vindictiveness. The return of superseding indictments is a common occurrence, and as a practical matter there will be few such cases in which defense counsel will not be able to characterize action by the prosecutor contrary to the interests of the defendant as a "vindictive" response to the exercise of some procedural right. The disruptive effects of allowing such easily made claims to be immediately renewed in the court of appeals following rejection by the district court can readily be envisioned. Proceedings in the district court ordinarily are brought to a halt while the defendant pursues appellate relief, relief before the court of appeals sitting en banc, and further review in this Court. In the present case, for example, trial pro-

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indictment on grounds of * * * prosecutorial vindictiveness is not an appealable final or interlocutory order * * *." Cf. *United States* v. *Levine*, 658 F.2d 113, 125-126 (3d Cir. 1981) (criticizing the *Griffin* doctrine and dismissing an attempted interlocutory appeal from a pretrial denial of a statute of limitations claim).

[6] We are forwarding a copy of our petition in *Goodwin* to counsel for respondents.

ceedings have been held in abeyance in the district court since May 19, 1980—more than a year and a half ago.

Certain panels in the Ninth Circuit have been quick to acknowledge the serious problems created by the *Griffin* rule. For example, in *United States* v. *Wilson*, 639 F.2d 500, 502 n.1 (9th Cir. 1981), the court observed that *Griffin* has encouraged a "[p]romiscuous resort to interlocutory appeals." The court added (*ibid.*) that *Griffin* is "frustrating the speedy trial policy, and the interlocutory appeals multiply the work of this court."[7] The court described the impact of *Griffin* in actual operation as follows (*ibid.*):

> Many of the claims of selective or vindictive prosecution are so patently frivolous that they can be disposed of summarily; but even summary disposition cranks into the life of a district court case several weeks of delay. Delay, disruption of calendars, loss of jury time, and needless expense follow in the wake of these interlocutory appeals. Once the *Griffin* rule was established, defense attorneys, as advocates, properly added "vindictive prosecution" to their check list of possible strategy for delay, continuance, severance, or dismissal. The resulting outpouring of motions was predictable. This court processed 13 *Griffin* and 25 *Abney* [v. *United States*, 431 U.S. 651 (1977)] appeals during the months of June, July, August and September of 1980. Few appeared to have any merit.

As both the Fifth Circuit and the D.C. Circuit recently have concluded, there is no reason to impose

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[7] The court in *Wilson* nevertheless took jurisdiction over a claim of impermissible selective prosecution, concluding that it was bound to do so by the reasoning of *Griffin*.

these substantial burdens on the judicial system. The decisions of this Court militate strongly against recognition of a right to interlocutory appeal in cases of this kind.

2. *a.* Congress has limited the jurisdiction of courts of appeals to "final decisions of the district courts." 28 U.S.C. 1291. As Justice Frankfurter observed in *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940), "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. * * * To be effective, judicial administration must not be leaden-footed." In criminal cases, this Court repeatedly has emphasized the special importance of strictly enforcing the final judgment rule. "[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962), quoted in *Abney* v. *United States*, 431 U.S. 651, 657 (1977).

One of the principal reasons for this Court's strict adherence to the rule of finality in criminal cases is the Sixth Amendment's guarantee of a speedy trial. "Fulfillment of this guarantee would be impossible if every pretrial order were appealable." *United States* v. *MacDonald*, 435 U.S. 850, 861 (1978). A speedy trial serves important societal interests as well as interests of the accused. Delay prejudices the ability of both the prosecution and the defense to present their cases, increases the cost of maintaining persons subject to pretrial detention, and prolongs the period during which defendants released on bail may commit other crimes. *Id.* at 862.

In the vast majority of cases, "final judgment" means imposition of sentence. *Berman* v. *United States*, 302 U.S. 211, 212 (1937). This Court has departed from that traditional requirement of finality in only a limited category of cases that satisfy the stringent criteria of the "collateral order" doctrine as articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949).[8] Indeed, the Court has departed from the final judgment rule on only three occasions in criminal cases, and in each instance the Court dealt with a special constitutional protection that would be irreparably lost if it were not conclusively determined before trial. In each such case, "denial of immediate review would render impossible any review whatsoever" (*United States* v. *Ryan*, 402 U.S. 530, 533 (1971)), because each case involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial" (*United States* v. *MacDonald*, *supra*, 435 U.S. at 860).

Thus, in *Stack* v. *Boyle*, 342 U.S. 1 (1951), the Court held that an order denying a motion to reduce bail pending trial was immediately appealable because meaningful review of the order setting bail could not be postponed until appeal from final judgment. At that late date, there would be no effective remedy if an appellate court determined that bail

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[8] The familiar requirements of *Cohen* apply only to that "small class" of orders that conclusively determine the disputed issue, resolve an important question completely separate from the merits of the case, and are "effectively unreviewable on appeal from a final judgment." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374-375 (1981), quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). See *Abney* v. *United States*, *supra*, 431 U.S. at 658.

had been denied improperly at the trial and pretrial stages of the case. Similarly, in *Abney* v. *United States, supra*, the Court held that a defendant could seek immediate appeal from an order denying a motion to dismiss an indictment on double jeopardy grounds. The right protected by the Double Jeopardy Clause, the Court held, "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" (431 U.S. at 660). The Double Jeopardy Clause protects a defendant not only against being twice convicted for the same offense, but also against being twice put to trial for the same offense (*id.* at 660-661). Postponing review until final judgment would expose the defendant to a second trial—the very evil the Double Jeopardy Clause was intended to prevent. Finally, in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), the Court found that a Congressman was entitled to an interlocutory appeal in a criminal case to assert his Speech or Debate Clause privilege. The Court held that because the Clause is intended to prevent questioning of Congressmen concerning legislative acts—not just conviction based on those legislative acts—interlocutory appeal must be available to guard against the evil that the Clause addresses (442 U.S. at 507-508).

These special concerns have no relevance in the present context. The Due Process Clause does not guarantee respondents a right to be free from trial. By hypothesis, respondents are subject to trial at least on the charges originally preferred against them prior to their exercise of a procedural right.[9] Thus,

[9] This is sufficiently clear from the remedy ordered by the court of appeals. The court required dismissal of the superseding indictment and reinstatement of the original indictment. App. A, *infra*, 12a.

there is no constitutional " 'right not to be tried' which must be safeguarded by interlocutory appellate review." *United States* v. *MacDonald, supra,* 435 U.S. at 860 n.7. If the original charges against respondents were improperly modified in retaliation for the exercise of a procedural right, effective review may be had following the entry of final judgment.[10]

This Court's decisions illustrate that proposition. Thus, in *North Carolina* v. *Pearce,* 395 U.S. 711, 714-715 (1969), the defendant's due process right to be free of a more severe sentence on retrial was protected by vacating that sentence after it had been imposed. Likewise, in *Blackledge* v. *Perry,* 417 U.S. 21 (1974), the defendant was fully protected against improper substitution of enhanced charges by post-conviction relief. See also *Chaffin* v. *Stynchcombe,* 412 U.S. 17, 28-29 n.15 (1973), acknowledging that modification of sentence "would provide an *absolute protection* from the possibility of vindictiveness * * *" (emphasis added).

In view of the clear opportunity for meaningful review after final judgment, this case is not materially different from the long line of criminal cases in which this Court has forbidden interlocutory review. See, *e.g., United States* v. *MacDonald, supra,* 435 U.S. at 863 (no pretrial review of an order denying a motion to dismiss the indictment under the

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[10] If charges are improperly modified and a criminal defendant is convicted following a trial on the merits, the sentence can be reduced to the level of the sentence available under the original charges, added charges can be stricken, or the entire indictment can be dismissed to allow reinstatement of the original indictment. See *United States* v. *Brizendine, supra,* 659 F.2d at 222 (collecting cases). These remedies, of course, all presuppose some demonstration of prejudice resulting from the modification of criminal charges.

Sixth Amendment's Speedy Trial guarantee); *Abney* v. *United States*, *supra*, 431 U.S. at 663 (no pretrial review of an order denying a motion to dismiss an indictment for failure to state an offense); *United States* v. *Ryan*, *supra*, 402 U.S. at 532-534 (no pretrial review of an order denying a motion to quash a grand jury subpoena duces tecum); *DiBella* v. *United States*, *supra*, 369 U.S. at 131-133 (no pretrial review under Section 1291 of an order granting or denying a motion to suppress evidence); *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 29-31 (1943) (no pretrial review of an order refusing to dismiss an indictment for lack of jurisdiction); *Cogen* v. *United States*, 278 U.S. 221, 223-228 (1929) (no pretrial review of an order denying a motion to suppress evidence); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910) (no pretrial review of an order rejecting a defendant's claim of statutory immunity from prosecution). See also *Flynt* v. *Ohio*, No. 80-420 (May 18, 1981) (no pretrial review under 28 U.S.C. 1257 of an order rejecting a selective prosecution claim).

b. The essential premise of the *Griffin* doctrine, applied by the Ninth Circuit in this case, is that the "psychological and financial burdens" of enduring trial require immediate resolution of claims of vindictive prosecution (617 F.2d at 1346). In adopting that premise, the Ninth Circuit purported to apply the reasoning of *Abney*, which noted that "the guarantee against double jeopardy assures an individual that * * * he will not be forced * * * to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense" (431 U.S. at 661). However, in transposing the reasoning of *Abney* into this different context,

the Ninth Circuit lost sight of the fact that the holding in *Abney* was necessitated by the "special features" of the Double Jeopardy Clause. *United States* v. *MacDonald, supra*, 435 U.S. at 855. Because the Double Jeopardy Clause is specifically designed to free an accused from successive trials, and not just a conviction following a second trial, considerations regarding the expense and hardship of multiple trials are relevant when double jeopardy claims are made. However, as the Court emphasized in *Abney, supra*, 431 U.S. at 663, "[q]uite obviously, such considerations [of expense, anxiety, and inconvenience] do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing the accused's motion to dismiss."

Neither Congress in fashioning the final judgment rule nor this Court in construing it have regarded the possible avoidance of a needless trial as a basis for sanctioning interlocutory appeals. Despite the substantial advantages that an accused will reap "in triumphing before trial, rather than after it," exceptions to the final judgment rule have been strictly limited to the assertion of constitutional rights that must be fully litigated before trial if at all. *United States* v. *MacDonald, supra*, 435 U.S. at 860 n.7. Unlike the unique constitutional right to be free from trial that is guaranteed by the Double Jeopardy Clause, the Due Process Clause merely provides a general guarantee that an accused's conviction will be fairly obtained and that punishment will not be enhanced solely to penalize the exercise of constitutional rights. Hence, this case presents the common situation where an accused must bear "the discomfiture and cost of a prosecution" before the constitu-

tional claim raised may properly be "reconsider[ed] by an appellate tribunal." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325-326. Accord, *Roche* v. *Evaporated Milk Association*, *supra*, 319 U.S. at 30.[11]

3. If we are correct that the court of appeals lacked jurisdiction over this appeal, it should not have expressed any views on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, 449 U.S. at 379-380; *United States* v. *MacDonald*, *supra*, 435 U.S. at 863 n.9. Since our submission is that there is no appellate jurisdiction to review the merits of this appeal, we will not address the merits at any length in this petition.[12] However, should the Court grant this petition but disagree with our submission that the court of appeals lacks appellate jurisdiction,

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[11] It is particularly appropriate to require a final judgment before reviewing claims of vindictive prosecution because there is a substantial likelihood that the defendant will be acquitted altogether, or will receive a lesser sentence than the sentence available under the original indictment. Either result would completely moot the sensitive constitutional questions implicit in a claim of prosecutorial vindictiveness—questions that require the judiciary to approach the limits of its authority under separation of powers principles by reviewing the broad prosecutorial discretion of the Executive Branch. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978).

[12] In view of the fact that this case presents a threshold question of appellate jurisdiction separate from the merits of respondents' vindictive prosecution claims, there is no occasion to hold this petition pending the Court's decision in *United States* v. *Goodwin*, cert. granted, No. 80-2195 (Nov. 30, 1981). Indeed, because of the serious practical costs to the administration of criminal justice imposed by the Ninth Circuit's assumption of jurisdiction over interlocutory appeals raising claims of vindictive or selective prosecution, we believe that expeditious resolution of the issue of jurisdiction is especially important.

we will urge the Court to reverse the decision of the court of appeals on the merits.[13]

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[13] The court of appeals' conclusion that the facts of this case manifest "prosecutorial vindictiveness," and require dismissal of the superseding indictment, illustrates the extremes to which some lower federal courts have gone in construing the doctrine of vindictive prosecution. It is difficult to conceive how a court could infer malice or vindictiveness when a prosecutor prefers new charges that result in a material *reduction* of potential punishment. See *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 29 n.15, observing that reducing the penalty whenever it exceeds the level of the penalty previously imposed "would provide an absolute protection from the possibility of vindictiveness." See also *id.* at 43 n.5 (Marshall, J., dissenting) (referring to the reduction of penalties as an "obvious" solution to any appearance of vindictiveness).

While the court of appeals speculated that the elimination of the original conspiracy count of the indictment and the streamlining of the charges thereunder could assist the prosecutor in presenting her case, the court ignored the fact that elimination of a sweeping conspiracy charge is ordinarily also a great benefit to the defense. See *Krulewitch* v. *United States*, 336 U.S. 440, 445-454 (1949) (Jackson, J., concurring); W. LaFave & A. Scott, *Criminal Law* 455-459 (1972).

Moreover, what the court of appeals characterized as a vindictive "threat" was in reality only a candid disclosure to respondents that additional charges, which could not be brought in the Eastern District of Kentucky, could and would be preferred against them if they obtained a transfer of the case to the Central District of California, where the false statements in question were made and where venue was properly laid. See App. E, *infra*, 16a-17a. For these and other reasons discussed in greater detail in our petition in *United States* v. *Goodwin*, *supra*, the finding of vindictiveness in this case is completely without justification. Moreover, it is fundamental that, "absent demonstrable prejudice," "dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

ROBERT J. ERICKSON
Attorney

DECEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-1405, 80-1409

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HOLLYWOOD MOTOR CAR COMPANY, INC.,
FREDERIC MICHAEL BERNSTEIN and
TERRANCE QUATKEMEYER, DEFENDANTS-APPELLANTS

Argued and Submitted Nov. 4, 1980

Decided May 26, 1981

Appeal from the United States District Court
for the Central District of California

Before CHOY and TANG, Circuit Judges, and HANSON,* District Judge.

CHOY, Circuit Judge:

This is a consolidated appeal from the district court's denial of a motion to dismiss the indictment on the ground of vindictive prosecution. The ques-

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* William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

tion on this appeal is whether a case of vindictive prosecution is established when the Government threatens a defendant with enhanced charges if he exercises his right to request a change of venue and then does enhance the charges even though the Government subsequently dismisses several of the charges. We find that a vindictive prosecution case is established and reverse the decision of the district court and remand for dismissal of the superseding indictment.

I. *Facts*

Hollywood Motor Car Company, Inc., Frederic Bernstein, and Terrance Quatkemeyer ("appellants") were indicted in the Eastern District of Kentucky on two counts: conspiracy and wrongful receipt and transportation of an unlawful imported Ferrari automobile.[1] The conspiracy count alleged as overt acts four false statements to customs agents in connection with four Ferraris. The two counts carried a possible combined penalty of 10 years and $20,000 in fines.

Appellants moved for a change of venue to the Central District of California. Before the motion was heard, an Assistant United States Attorney and a United States Customs Agent threatened that the Government would add new counts to the indictment if appellants pursued their motion for change of

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[1] Count One alleged a conspiracy in violation of 18 U.S.C. § 371 and Count Two alleged the receipt, transportation and sale of unlawfully imported merchandise in violation of 18 U.S.C. § 545.

venue.[2] Appellants pressed the motion, however, and obtained a change of venue.

Appellants were rearraigned in the Central District of California. Four days later, an Assistant United States Attorney obtained a superseding indictment, charging appellants with four new substantive counts of making false statements, as well as the two counts in the original indictment. The new indictment exposed appellants to a possible 18 years imprisonment and $40,000 in fines.[3]

At a subsequent status conference to discuss pretrial motions, appellants advised the court and the Government that they intended to challenge the indictment on the ground of vindictive prosecution. The Assistant United States Attorney conceded that prosecutors from the Eastern District of Kentucky

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[2] James R. Hartke, attorney for appellant Quatkemeyer, filed an affidavit before the district court stating that he was told by a United States Customs Agent and a United States Attorney in Kentucky in at least two separate telephone conversations that if his client were to file a motion for change of venue from the Eastern District of Kentucky to the Central District of California there would be ensuing additional counts and/or indictments against both Bernstein and Quatkemeyer. The Government filed no counteraffidavit and apparently acknowledges that these threats were made.

[3] The new indictment realleged the conspiracy count verbatim, restructured Count Two so as to charge unlawful importation of merchandise in violation of 18 U.S.C. § 545 (as opposed to the receipt, transportation and sale of unlawfully imported merchandise charged in the Kentucky indictment), and added four new counts alleging violations of 18 U.S.C. § 542. The new counts alleged that appellants introduced four automobiles into the commerce of the United States by the use of false statements. These false statements were alleged as overt acts supporting the conspiracy count in the original indictment.

had requested the superseding indictment but she stated that she was already considering dismissing several of the counts before the status conference was held.[4]

On the day after the status conference, the Government moved to dismiss the original conspiracy count and two of the four new counts relating to the false statements. The district court dismissed the counts on May 8, 1980, and set trial for June 17, 1980.

On May 19, 1980, appellants moved to dismiss the indictment for vindictive prosecution. After a hearing, the district court denied the motion, without stating its reasons. Appellants Hollywood Motor Car and Frederic Bernstein and appellant Terrance Quatkemeyer filed separate notices of appeal from the denial of the motion. At their request, the district court vacated the trial date. The Government requested that the district court set trial for the next available date and filed an emergency motion for

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[4] The Government related these events in its brief in relevant part:

> All of the steps that were taken later that week to pare down and simplify the case were already under discussion and consideration by the Government before the start of the hearing on May 5, *before* the Government had heard defense counsel's remarks concerning the various motions to dismiss. The suggestion that with respect to the conspiracy count the Government was responding to an unfiled motion to dismiss that count is belied by the Government's statement at the hearing that as of May 5, it had not yet seen any such motion. In any event, the Government's declaration filed in opposition to the vindictive prosecution motion establishes that the Government had hoped to dismiss the conspiracy count even before it sought the Superseding Indictment, and thus before it had notice of a motion to dismiss that count.

summary affirmance of the district court's order. An expedited briefing schedule was imposed by order of this court on July 3, 1980. The Government also moved to consolidate the two appeals. On August 5, 1980, this court granted the Government's motion to consolidate but denied its motion for summary affirmance.

II. *Jurisdiction*

This court has held that the denial of a motion to dismiss based on the ground of vindictive prosecution is immediately appealable as a final decision under 28 U.S.C. § 1291. *United States* v. *Burt*, 619 F.2d 831, 835 (9th Cir. 1980); *United States* v. *Griffin*, 617 F.2d 1342, 1343-46 (9th Cir.) cert. denied, —— U.S. ——, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980).

III. *Vindictive Prosecution Charge*

The right to due process of law is violated where the Government increases the severity of alleged charges in response to the exercise of constitutional or statutory rights. *Blackledge* v. *Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); *United States* v. *Burt*, *supra*, at 836; *United States* v. *DeMarco*, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 85 (1977). Vindictive prosecution is generally found where the Government has occasion to re-indict or re-try a defendant after the exercise of a procedural right. *United States* v. *Burt*, *supra*, at 836.

In *United States* v. *DeMarco*, *supra*, this court held that a defendant's due process rights are violated where the Government threatens to increase the

severity of the charges against him to discourage exercise of his venue rights. The record before us is akin to that which was before the court in *DeMarco*. In *DeMarco*, the defendant was indicted in the District of Columbia in connection with his activities relating to preparation of former President Nixon's income tax returns. DeMarco moved for a change of venue to the district of his residence in California and the motion was granted. The defendant's counsel then received a call from counsel for the Government informing him that the Government was considering filing a motion for reconsideration of the order of transfer, that if the defendant successfully transferred his case the Government would consider bringing more counts against him and that the Government would "restructure" the case against him if it were moved. The trial was moved and shortly thereafter, the Government obtained a second indictment in California which added a new charge based upon essentially the same facts as the initial indictment. The court held that a claim of vindictive prosecution had been established and ordered the indictment dismissed. The court held that "it was not constitutionally permissible for the Government to threaten to 'up the ante' to discourage DeMarco from exercising his venue right; *a fortiori* it was constitutionally impermissible to follow up that threat with the California indictment." *DeMarco*, *supra*, at 1227-28.

The present case is very similar to *DeMarco*. The United States Attorney in Kentucky threatened appellants with increased charges if they pursued their motion for a change of venue. Notwithstanding this threat, appellants went forward with their motion and were successful in obtaining an order transferring their case to California. The Assistant United

States Attorney in California then obtained a new indictment from the grand jury at the request of the United States Attorney's Office in Kentucky. The new indictment charged the appellants with four new counts in addition to the two they had faced under the original Kentucky indictment. While this case differs somewhat from *DeMarco*, the differences are not sufficient to require a different result.

This case involves two separate prosecutors' offices—the United States Attorney's Office in Los Angeles and the United States Attorney's Office for the Eastern District of Kentucky. The *DeMarco* case involved the Watergate Special Prosecution Force and not two different United States Attorneys' Offices. In *United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980), this court noted, but specifically declined to decide whether vindictive prosecution could apply where there are two independent prosecutors' offices involved.[5] The court further noted that all other cases finding vindictive prosecution involved a single prosecutor's office. Venue-change cases will almost always involve two independent prosecutorial bodies. We find that the *DeMarco* court holding applies in cases involving separate prosecutors' offices. To hold otherwise would unreasonably restrict the application of *DeMarco* and the protection of defendant's venue rights to a very small number of cases.

The Government contends that this court should analyze this case under the rationale advanced and used in other Ninth Circuit cases, including *United States* v. *Rusega-Martinez*, 534 F.2d 1367 (9th Cir. 1976), *United States* v. *Burt*, *supra*, and *United States* v. *Griffin*, *supra*. Those cases did not involve

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[5] *Burt* involved two independent prosecutorial bodies—the United States and the State of California.

express threats but rather situations in which it was the sequence of events which gave rise to an appearance or apprehension of vindictiveness by the defendant. Under the rule developed in those cases, when a defendant attempts to have the charges dismissed based on the allegation of vindictive prosecution, he must make the initial showing of an appearance of vindictiveness.

> At this point, the burden then shifts to the prosecution to prove that the increase in the severity of the charges did not result from any vindictive motive. Instead, the prosecutor, to rebut the presumption, must show his decision to re-indict with more severe charges was "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness."

United States v. *Burt*, *supra*, at 836, *quoting United States* v. *Griffin*, *supra*, at 1347 (citations omitted). This analysis has been used in cases decided both before and after *DeMarco* in which the sequence of events gives rise to an appearance of vindictiveness. This case, however, involves an undisputed express threat and is controlled by the holding and reasoning in *United States* v. *DeMarco*.

The Government argues that it should be allowed to proceed under the current indictment because some of the additional charges were subsequently dismissed and the total possible sentence length now faced by each appellant is shorter than that he formerly faced in Kentucky.[6] As the appellants note, however, they

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[6] The current indictment contains three counts. Two counts allege violations of 18 U.S.C. § 542, introducing automobiles into the commerce of the United States by the use of false

must now defend against three counts instead of two, and the district judge has observed that the Government may have a better chance of obtaining a conviction on the counts as restructured. The fact that the Los Angeles prosecutors subsequently dropped some of the additional charges does not change the result. The court in *DeMarco* stated:

> It is irrelevant that a particular defendant exercises his statutory rights, despite his fear of vindictiveness and despite the lack of vindictiveness in fact in subsequent proceedings instituted by the prosecutor. The prophylactic rule is designed not only to relieve the defendant who has asserted his right from bearing the burden from "upping the ante" but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future.

DeMarco, supra, at 1227. Under this rationale the subsequent dismissal of some of the added charges does not preclude the establishment of a charge of vindictive prosecution.

We hold that this case falls under this court's ruling in *United States* v. *DeMarco, supra.* The Kentucky prosecutors threatened the defendants with additional charges if they exercised their right to a change of venue; the defendants nonetheless requested and received the change and the Kentucky prosecutors then had the Los Angeles prosecutors file additional charges. These actions establish a case of

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statements, and one count alleging unlawful importation of merchandise in violation of 18 U.S.C. § 545. Appellants face a possible nine years in prison under this indictment as opposed to a possible 10 years under the Kentucky indictment.

vindictive prosecution and the Government has lost its right to proceed against the defendants on these charges.

IV. *Remedy*

We have found that vindictive prosecution has been established and the Government cannot proceed to trial on the added charges. The only remaining issue concerns the ability of the Government to proceed against appellants on the original Kentucky charges.[7] Appellants ask that all of the remaining indictment counts be dismissed, arguing that to allow the Government to proceed under the original indictment would undermine the intended deterrent effect of the *DeMarco* rule. The court in *DeMarco* was not faced with the issue of whether the threat and the appearance of vindictive prosecution should preclude the Government from proceeding to trial on the original charges. In that case the original indictment charge was dismissed during the course of trial on grounds unrelated to the vindictive prosecution issue and was not involved in the appeal.

We are unable to find any Ninth Circuit cases squarely on point. But in *United States* v. *Morrison*, —— U.S. ——, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), the Supreme Court restated the general rule that remedies should be tailored to the injury suffered from the violation and should not unnecessarily infringe on competing interests such as society's interest in the administration of justice. *Id.* 101 S.Ct

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[7] The original indictment charged one count of conspiracy and one count of receipt, transportation and sale of unlawfully imported merchandise.

at 667. In *United States* v. *Owen*, 580 F.2d 365 (9th Cir. 1978), this court observed that the dismissal of an indictment on the basis of governmental misconduct is an extreme sanction which should be infrequently utilized. The court stated:

> Under its inherent supervisory powers, a federal court is empowered to dismiss an indictment on the basis of government misconduct. As such, dismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature. However, these supervisory powers "remain a harsh, ultimate sanction [which] are more often referred to than invoked." (Citations omitted.)

Id. at 367.

In *Morrison*, the Supreme Court refused to dismiss the indictment despite assuming that the government agents had violated the defendant's sixth amendment right to counsel. The Court noted that "the record before us does not reveal a pattern of recurring violations . . . that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *United States* v. *Morrison*, *supra*, 101 S.Ct. at 667 n.1. A careful examination of the record in this case reveals no such pattern of recurring violations.

While we deplore the tactics and actions of the prosecutor and custom's agent in threatening the appellants with increased charges, we do not feel that the actions are sufficient to require the invocation of such an extreme sanction as dismissal of the original "untainted" Kentucky charges.

V. *Conclusion*

Under *United States* v. *DeMarco*, appellants have established a claim of vindictive prosecution. The decision of the district court is reversed and the case is remanded for the dismissal of the superseding indictment and reinstatement of the original two-count Kentucky indictment.[8]

REVERSED and REMANDED, with directions.

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[8] This ruling in no way precludes the district court from permitting a dismissal of either of these counts.

APPENDIX B

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date [May 26, 1981] on the attached decision of the court. If the decision is by opinion, judgment was entered as of the decision date printed on the slip opinion.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1405

UNITED STATES OF AMERICA, APPELLEE-PETITIONER

vs.

HOLLYWOOD MOTOR CAR CO., INC., ET AL., DEFENDANTS-APPELLANTS

ORDER

Filed October 26, 1981
Clerk, U.S. Court of Appeals

Before: CHOY and TANG, Circuit Judges, and HANSON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CR-80-299(A) LEW

UNITED STATES OF AMERICA, PLAINTIFF

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL., DEFENDANTS

ORDER

The motions of defendants Hollywood Motor Car Company, Inc., Terrance Quatkemeyer and Frederic Michael Berstein to dismiss the indictment and for production of a tangible object for inspection came on regularly for hearing on June 2, 1980.

The Court having reviewed all of the papers submitted by the parties in connection with such motions, and having heard argument thereon by counsel, and good cause appearing therefor,

IT IS ORDERED that both motions are denied.

DATED: June 10, 1980

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
United States District Judge

APPENDIX E

DECLARATION OF MOLLY MUNGER

I, MOLLY MUNGER, declare and state as follows:

1. I am an Assistant United States Attorney with the United States Attorney's office for the Central District of California. I am the Assistant United States Attorney assigned to the case of *United States v. Hollywood Motor Car Co., Inc., et al.*, No. CR 80-299(A)-LEW. This case is currently set for trial on June 17, 1980.

2. The case was transferred here from the Eastern District of Kentucky pursuant to a motion by defendants. I first saw the file on April 21, 1980, when the parties first appeared in the Central District for trial-setting.

3. At that time, the indictment was in two counts, one count of conspiracy (18 U.S.C. § 371) and one count of smuggling (18 U.S.C. § 545). The conspiracy count was eleven pages long and alleged 53 overt acts, including the falsification of customs forms with respect to four different automobiles in violation of 18 U.S.C. § 542. The smuggling count alleged the unlawful importation of a 1969 Ferrari whose vehicle number had been fraudulently changed to make it appear to be a 1967 Ferrari.

4. It was alleged that all of the vehicles at issue had been imported into the United States in Los Angeles. Therefore, there was venue in the Central District of California for the four false statement charges which were alleged as overt acts in the conspiracy count. It appeared to me that these offenses had been alleged as overt acts in a conspiracy count, instead of as substantive counts, because the case was developed by Customs in the Eastern District of Ken-

tucky and Kentucky did not have venue to charge the straightforward substantive counts.

5. It seemed to me that venue problems in the Eastern District of Kentucky had caused the case to be cast in a more complicated form than was necessary. I believed that it would be in everyone's interest, including the Court's and the defendants', if the matter were pared down and simplified.

6. On April 25, 1980, within a week after receiving the file, I presented a superseding indictment to the grand jury in the Central District. The Superseding Indictment simplified the smuggling count concerning the importation of the 1969 Ferrari and added four substantive counts for false statements to Customs. The four false statement counts represented the same four offenses that were alleged as overt acts in the Kentucky indictment. The Superseding Indictment set forth six charges, the original conspiracy count and the original smuggling count, somewhat modified, plus four new substantive counts.

7. At the time I presented the Superseding Indictment, I hoped to dismiss the lengthy conspiracy count as duplicative of the shorter and more straightforward substantive counts which had been added. I did not omit the conspiracy count from the Superseding Indictment because I had had the case less than a week at that time. I felt that such action should probably not be taken by our office without further study of the file and communication with the United States Attorney's Office in Kentucky.

8. After further study of the file and communication with the Kentucky office, I received authority to seek dismissal of the conspiracy count. By May 8, 1980, I had requested, and Judge Waters had granted, the dismissal of the conspiracy count.

9. At the same time I moved for dismissal of the conspiracy count I also obtained dismissal of two of the new false statement counts. These counts had been alleged as overt acts in the conspiracy count but did not seem to me upon analysis to be as aggravated offenses as the other two false statement counts. I sought the dismissal of these counts also for the purpose of simplifying the case in everyone's interest.

10. The changes which I have pursued in connection with this case were not pursued by me in an effort to punish the defendants for their transfer or for any other reason. I inherited from another district an indictment which I thought was needlessly complicated. It alleged two tangential charges I did not feel should be pursued and alleged other charges in the form of a conspiracy count which could more efficiently be handled as substantive counts. I proceeded to simplify the case in an effort to save time and effort for everyone.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 23rd day of May, 1980, in Los Angeles, California.

/s/ Molly Munger
MOLLY MUNGER

APPENDIX F

ANDREA SHERIDAN ORDIN
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
MOLLY MUNGER
Assistant United States Attorney
1400 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-6682

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 80-299(A)-LEW

UNITED STATES OF AMERICA, PLAINTIFF

v.

HOLLYWOOD MOTOR CAR CO., INC., ET AL.

MOTION TO DISMISS COUNTS 1, 5 AND 6 OF THE INDICTMENT; ORDER THEREON

IN THE INTEREST OF JUSTICE the Government hereby moves this Honorable Court for an order dismissing counts 1, 5 and 6 of the Superseding Indictment in the above matter.

DATED this 6th day of May, 1980.

Respectfully submitted,

ANDREA SHERIDAN ORDIN
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ Molly Munger
MOLLY MUNGER
Assistant United States Attorney

Attorneys for Plaintiff United States of America

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359269 734

Supplemental Brief

1

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FILED
APR 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1144

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1144

UNITED STATES OF AMERICA, PETITIONER

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to Rule 35.5 of the Rules of this Court, we wish to bring to the Court's attention the recent decision of the Eighth Circuit, sitting en banc, in *United States* v. *Grabinski*, No. 81-1812 (Feb. 26, 1982).* By this decision, the Eighth Circuit joins the D.C. Circuit (*United States* v. *Brizendine*, 659 F. 2d 215 (1981)), and the Fifth Circuit (*United States* v. *Gregory*, 656 F. 2d 1132 (1981)), in rejecting the rule of *United States* v. *Griffin*, 617 F. 2d 1342 (9th Cir. 1980). Thus, at present, respondents' claim of "vindictive prosecution" would be heard only in the Ninth Circuit, while the Fifth, Eighth and D.C. Circuits would dismiss

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*We have lodged ten copies of the Eighth Circuit's decision and are serving a copy on counsel for respondents.

their attempted interlocutory appeal. In view of the deepening conflict among the circuits on this important and recurring issue, review by this Court is warranted.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1981

DOJ-1982-04

Supplemental Brief 2

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1144

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SECOND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1144

UNITED STATES OF AMERICA, PETITIONER

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SECOND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to Rule 35.5 of the Rules of this Court, we wish to bring to the Court's attention the recent decision of the Seventh Circuit in *United States* v. *Rosario*, No. 81-2432, (May 10, 1982).* By this decision, the Seventh Circuit joins the District of Columbia Circuit (*United States* v. *Brizendine*, 659 F. 2d 215 (1981)), the Fifth Circuit (*United States* v. *Gregory*, 656 F. 2d 1132 (1981)), and the Eighth Circuit (*United States* v. *Grabinski*, 674 F. 2d 677 (1982) (en banc)), in rejecting the rule of *United States* v. *Griffin*, 617 F. 2d 1342 (9th Cir. 1980). In view of this pervasive conflict

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*For the convenience of the Court, we have lodged ten copies of the Seventh Circuit's decision and are serving a copy on counsel for respondents.

among the circuits, this Court should grant the petition for a writ of certiorari in the present case.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1982

DOJ-1982-05

Opposition

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1144
IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Petitioner,

vs.

HOLLYWOOD MOTOR CAR COMPANY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

DOUGLAS G. SIMON,
THOMAS R. SHERIDAN,
SIMON & SHERIDAN,
2404 Wilshire Boulevard,
Suite 400,
Los Angeles, Calif. 90057,
(213) 380-3330,
Attorneys for Respondents Hollywood Motor Car Company, Inc. and Fredric Michael Bernstein.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

QUESTIONS PRESENTED.

1. Should the Court grant petitioner review of an issue of appealability when petitioner not only failed to raise the issue during the appeal but urged the court of appeals that it should entertain the appeal?

2. Whether the Ninth Circuit was correct that the admitted express threat here by petitioner that additional charges would be brought against respondents if they pursued a change of venue, followed by the return of a superseding indictment as the execution of the threat, violated the Due Process Clause.

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No. 81-1144

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

vs.

HOLLYWOOD MOTOR CAR COMPANY, INC., *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

Respondents Hollywood Motor Car Company and Fredric M. Bernstein respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 646 F.2d 384.

Statement.

This case involves the importation of Ferrari automobiles from Europe. Respondents were originally charged in the United States District Court for the Eastern District of Kentucky in a two-count indictment alleging essentially that respondents imported a 1969 Ferrari into the United States disguised as a 1967 Ferrari[1] and filed customs declarations

[1]Under federal regulations, an automobile manufactured in 1967 may be imported without restrictions while one manufactured after 1968 must meet some federal safety and smog standards.

reflecting false purchase prices with respect to other imported Ferraris. ER 1.[2]

Respondents moved in the United States District Court for the Eastern District of Kentucky to transfer venue to the Central District of California pursuant to Rule 21(b), Federal Rules of Criminal Procedure. ER 28. Before the motion was heard, respondents were threatened by both the prosecutor and a United States Customs Agent, on more than one occasion, that if respondents pursued their motion for change of venue, the Government would retaliate by obtaining a superseding indictment adding new counts against respondents. ER 97. It is undisputed that this threat was not made in the context of any plea negotiations.

Respondents successfully obtained a change of venue to the Central District of California and were rearraigned there on April 21, 1980. ER 45, 199. The California prosecutor on that day first saw the file in this case. Pet. 16a. Four days later the California prosecutor, at the request of the Kentucky prosecutor, obtained a superseding indictment charging respondents with *six counts*. Pet. 7. The superseding indictment realleged the original conspiracy count verbatim, substantially restructured and fortified Count Two so as to charge unlawful importation of the 1969 Ferrari in violation of 18 U.S.C. §545 (as opposed to the receipt, transportation and sale of the 1969 Ferrari as charged in the original indictment), and added four new counts alleging violations of 18 U.S.C. §542. Pet. 3a, n.3. These new counts alleged that respondents introduced four Ferraris, including the 1969 Ferrari, into the commerce of the United

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[2]Excerpt of Record filed in the Ninth Circuit. Other citations herein will be to the Appellee's Brief filed by the Government in the Ninth Circuit [AB] and to the Appellants' Opening Brief [AOB] filed by respondents in the Ninth Circuit.

States after understating their purchase price to Customs. ER 65.

After being advised in open court that respondents intended to move to dismiss the superseding indictment on the ground of vindictive prosecution (ER 73) and after conceding that the superseding indictment was obtained at the request of the Kentucky prosecutors (ER 76), the California prosecutor moved to dismiss Counts One, Five and Six of the superseding indictment that had been returned by the grand jury just eleven days earlier.[3] ER 84. The district court granted the prosecutor's motion to dismiss. ER 85.

Respondents shortly thereafter moved to dismiss the remaining three counts of the superseding indictment on the ground that the vindictive or retaliatory nature of the indictment violated the Due Process Clause under *Blackledge v. Perry*, 417 U.S. 21 (1974) and *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.) *cert. denied*, 434 U.S. 827 (1977). ER 88. The Government's opposition contained the declaration of the California prosecutor that she had obtained the superseding indictment in an effort to simplify the case.[4] Pet. 16a-18a.

The district court denied respondents' motion without opinion. ER 160. Respondents filed a notice of appeal from the denial of the motion to dismiss. ER 173.

At this point, the Government availed itself of a unique procedure. Two weeks after the notice of appeal was filed and before any action was taken on appeal, the Government

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[3]The California prosecutor had to obtain authority from the Kentucky prosecutor to seek dismissal of Count One, the conspiracy count. Pet. 17a.

[4]A few weeks earlier the same prosecutor told the district court: "But I think your Honor can understand that this is a situation where the file comes from another District *and they want the superseding indictment.*" ER 76. [Emphasis added.]

filed an Emergency Motion for Summary Affirmance of the order of the district court. App. A, *infra*. In its emergency motion the Government urged that the Ninth Circuit "has jurisdiction to review prior to trial a District Court's denial of the defendants' motion to dismiss for vindictive prosecution." *Id.* at 5a. Proceedings in the Ninth Circuit followed an unusual course. Respondents filed a brief in the Ninth Circuit which served both as their opposition to the Government's emergency motion and their opening brief on appeal. The Government, in addition, filed an appellee's brief. The court of appeals denied the Government's emergency motion for summary affirmance and ordered consideration of the appeal expedited. Pet. 5a.

After oral argument, the court of appeals reversed the district court and ordered the superseding indictment dismissed for prosecutorial vindictiveness. Pet. App. A. The court found that the undisputed express threat made to respondents by the Government to intimidate them from pursuing a change of venue distinguished this case from the usual situation in which the mere sequence of events gives rise to a charge of vindictive prosecution.[5] The court of appeals deplored the prosecutor's tactics and held that the rationale of *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.) *cert. denied*, 434 U.S. 827 (1977) applied to the action of the Government in this case. *id.* at 11a. Accordingly, the court held, when the prosecution threatened respondents with additional charges should they exercise their right to seek a change of venue, the Government violated the Due Process Clause and lost its right to proceed against respondents on those charges. *Id.* at 6a-10a. The court specifically noted that the California prosecutor acted at the request of

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[5]See, *e.g.*, *United States v. Goodwin*, *cert. granted*, No. 80-2195 (Nov. 30, 1980).

the Kentucky prosecutor in superseding the indictment and, thus, carrying out the threat.[6] *Id.* at 7a, 9a.

The opinion of the court of appeals held that the dismissal of some of the additional charges did not erase the vindictiveness. Although total sentencing exposure was not enhanced, three counts remained in the superseding indictment rather than the two counts in the original indictment. Moreover, the new indictment may certainly have improved the Government's chances of convicting respondents at all. *Id.* at 8a-9a.

The issue of appealability was never raised by petitioner in its brief on appeal in the Ninth Circuit. On the contrary, the Government affirmatively stated in its emergency motion for summary affirmance that the Ninth Circuit had jurisdiction to decide the pretrial appeal of the district court order. The issue of appealability was raised for the first time in this case in the Government's petition for rehearing in the Ninth Circuit.

Reasons for Denying the Writ.

1. This Court should deny certiorari in this case because petitioner failed to raise the issue of appealability throughout the proceedings below. Although appealability is an important element in the administration of the federal law, so too is it important that issues brought to this Court be raised by petitioners and discussed, analyzed and decided by the lower federal courts. In this case, appealability, the central

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[6]The court of appeals implicitly rejected the rationale formally advanced by the California prosecutor that the superseding indictment was her idea. Accordingly, petitioner's characterization that "there was no suggestion that the successor prosecutor had acted for vindictive reasons" (Pet. 5) is inaccurate and misleading. The successor prosecutor, knowing the threat had been made, executed it after communication with, and on behalf of, the Kentucky prosecutor.

issue of the Government's petition,[7] was not an issue at all in either the district court or the court of appeals. But petitioner here did more than merely fail to raise the question. Petitioner consistently *asserted* appellate jurisdiction for its own purposes throughout the appeal in this case. Now petitioner belatedly tries to invoke the aid of this Court to "undo" a decision of the court of appeals which, however unfavorable, it went to extraordinary lengths to obtain.

After respondents' notice of appeal was filed, a status conference was held in the district court. There petitioner made no objection to continuing the trial pending appeal nor did it question, or even criticize, the appealability rule of *Griffin*. ER 162-171. Petitioner simply never raised the issue in the district court. Neither did petitioner question appealability while this case was on appeal in the Ninth Circuit. Rather, petitioner affirmatively urged the court of appeals that the order of the district court *was immediately appealable*. App. A, *infra*, at 5a.

The chronology of proceedings in the Ninth Circuit, as well as the representations and arguments made by petitioner, are relevant in assessing whether petitioner should be granted review. Ten days after the existing trial date was continued pending appeal (without objection by petitioner), petitioner filed its Emergency Motion for Summary Affirmance, repeatedly citing *Griffin* (*Id.* at 5a, 9a, 12a) and representing to the court of appeals that, based on *Griffin*, it "has jurisdiction to review prior to trial a District Court's denial of a defendant's motion to dismiss for vindictive

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[7]Petitioner spent only one paragraph on the question of whether the express executed threats in this case should have been deemed vindictive.

prosecution." *Id.* at 5a. By its "emergency" motion,[8] petitioner urgently requested the court of appeals to decide respondents' appeal summarily and affirm the district court. *Id.* at 13a.

The Government's "emergency" motion caused the court of appeals drastically to accelerate the briefing schedule on appeal. Respondents had less than one week to file their brief with petitioner's brief due a week later. Order of the Ninth Circuit, No. 80-1405, July 1, 1980. Respondents quickly drafted their pleading in the court of appeals which served both as their opening brief on appeal and their opposition to petitioners' emergency motion. Respondents stated in their brief that the court of appeals "has jurisdiction to entertain this appeal pursuant to 28 U.S.C. §1291", citing *Griffin*. AOB 4. Appealability was not among the issues presented by respondents to the Ninth Circuit.

Petitioner next filed another motion in the court of appeals asking that respondents' appeal be consolidated with that of a co-defendant. In the prosecutor's declaration supporting the motion, petitioner represented to the Ninth Circuit as follows:

> "The sole issue on both of the appeals is the same: Whether the District Court erred in denying the joint motion to dismiss." Motion to Consolidate Appeals at 3.

Shortly thereafter, petitioner filed its appellee's brief in the court of appeals. Consistent with petitioner's emergency motion, petitioner's motion to consolidate and respondents' brief, the issues presented in petitioner's appellee's brief did not include appealability. In fact, not a single word

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[8]The nature of the "emergency" was a July 29, 1980 tentative trial date which had been requested by the Government specifically to support its claim of "emergency". E.R. 167-168.

appeared in petitioner's brief questioning appealability in this case. Instead, petitioner urged the Ninth Circuit to affirm the district court. AB 20.

Far from notifying the Ninth Circuit of its doubts about *Griffin*, petitioner actually relied on the opinion in this appeal. Petitioner liberally cited *Griffin* in its brief to the court of appeals, quoted from the *Griffin* opinion and claimed that *Griffin* "comprehensively analyzed" the development of the law of vindictive prosecution. AB 11-14. Shortly thereafter, the Ninth Circuit denied the Government's emergency motion for summary affirmance and set the case down for expedited consideration. Order of the Ninth Circuit, No. 80-1405, August 5, 1980.

Respondents' notice of appeal was filed on June 12, 1980. ER 173. The case was argued before the Ninth Circuit on November 4, 1980 and decided on May 26, 1981. Pet. la. It was not until July 14, 1981, however, in a petition for rehearing, that petitioner suggested for the first time that interlocutory appeals should not be permitted in vindictive prosecution cases. For over a year on appeal, since the Government filed its emergency motion in the Ninth Circuit on July 9, 1980, all of petitioner's pleadings and actions consistently reflected its initial "emergency" request that the court of appeals assume jurisdiction and decide this case. Only after the court of appeals held that petitioner had unconsitutionally threatened and retaliated against respondents did petitioner first question appealability. Petitioner should not be permitted now at the eleventh hour to disclaim its repeated conduct directly and indirectly urging the assumption of jurisdiction by the court of appeals.

2. Review should be denied to petitioner because the asserted conflict between this case and the decisions in the District of Columbia Circuit and the Fifth Circuit is illusory. Here the undisputed facts display an express threat to

respondents, outside of the context of plea bargaining, to deter them from exercising their right to seek a change of venue. Neither of the cases in the D.C. Circuit and the Fifth Circuit involved an express threat and one of them was expressly limited to the plea bargaining process.

The decision of the D.C. Circuit in *United States v. Brizendine*, 659 F.2d 215 (1981) involved the claim by defendants that the Government had acted vindictively in the course of plea bargaining. The defendants claimed that their corporation was offered a plea bargain by the Government which the corporation refused. Subsequently both the corporation and several of its officers were indicted. The defendants argued that the Government was required "to disclose its intention to prosecute individuals if the corporation rejected the proposed plea agreement," and that the subsequent indictment of the individual defendants after the plea agreement was rejected created the "appearance" of prosecutorial vindictiveness. 659 F.2d at 217. The Government strongly disagreed with the facts as set forth by the defendants. *Id.*

There was no express threat in *Brizendine* as there is here. There is little dispute about the facts here while much was hotly disputed in *Brizendine*. Finally, the essence of the vindictiveness claim in *Brizendine* was the nature of the Government's plea bargaining itself while here plea bargaining was not even remotely involved. The last distinction is especially important because the D.C. Circuit, although disagreeing with the rationale of *Griffin*, limited its holding to the plea bargaining context:

> "We therefore hold that these appellants must await final judgment before challenging their indictments on due process grounds *relating to the plea negotiation process*, and we do not reach the merits of their claim." *Id.* at 218. [Emphasis added.]

The Fifth Circuit's decision in *United States v. Gregory*, 656 F.2d 1132 (1981) is also factually distinguishable from this case. The defendants in *Gregory* blithely made a generalized claim of prosecutorial vindictiveness the strongest support for which apparently being an alleged comment made by the prosecutor that he was "after" them. 656 F.2d at 1135. No claim was made in *Gregory* of a threat to increase charges should the defendants seek to exercise their procedural rights as in the case at bar. The Fifth Circuit, while declining to find appealable the clearly frivolous claim made by the defendants there, acknowledged that some claims of vindictiveness should be appealable before trial:

> "There may be vindictiveness claims, of course, which by their very nature would be destroyed if an appeal was delayed. An example would be if defendants presented substantial evidence that the prosecutor intended to try them for reasons unrelated to the enforcement of the laws and for the sole purpose of having them go through the psychological and financial burdens of trial, without any reasonable prospect of conviction. In this situation, the malicious purpose would be accomplished regardless of the outcome of the trial, and could not be rectified by any future appeal." 656 F.2d at 1136.

The example given by the Fifth Circuit aptly describes the coercion employed by the Government in the case at bar. The Government threatened respondents that if they exercised their right to make a motion in the district court for a change of venue, the Government would bring charges against respondents in California which the Government had no intention of bringing if respondents did not seek a new venue. Attempting to intimidate defendants from foregoing a procedural right is "unrelated to the enforcement of the laws" and the threatened punishment is plainly "for the

sole purpose of having them go through the psychological and financial burdens of trial''. The purpose of the superseding indictment in this case was to punish respondents for changing venue, not to enforce the federal law.

The final consideration mentioned by the Fifth Circuit in the quoted passage above is whether the Government's ''malicious purpose'' would succeed whether or not the defendant triumphed at trial. The Government here has admitted its malicious purpose; there is nothing equivocal about the threat. If respondents must wait until after trial to raise the deplorable tactics of the Government, the ''malicious purpose'' will already have succeeded. There would be little disincentive to the Government to refrain from impermissibly threatening defendants were appeal remote.

Because this case involved a threat, which was later executed and which was completely unrelated to the plea bargaining process, neither *Brizendine* nor *Gregory* presents the conflict offered by petitioner.

3. It is premature to assess the practical problems created by the *Griffin* rule of appealability. Vindictive prosecution is a new and rapidly evolving area of the law. It has only been since *Blackledge v. Perry*, 417 U.S. 21 (1974) that the meaning of prosecutorial vindictiveness has begun to be explored. Only three cases in the courts of appeals (*Griffin*, *Brizendine* and *Gregory*) have approached a thoughtful discussion of the issue of pretrial appealability. Three cases are few indeed upon which to base an exercise of the Court's certiorari jurisdiction. This issue is not now ripe for decision.

A number of considerations indicates that this issue need not yet be decided by the Court. For example, it is likely that the intramural dialogue about *Griffin* in the Ninth Cir-

cuit, mentioned in the petition (Pet.10), will lead to further discussion and, perhaps, reconsideration of *Griffin* in light of *Brizendine* and *Gregory* if the Government presents the issue in a subsequent appeal in a timely fashion. Also, as other circuits reach the question for the first time, different persuasive rationales about pretrial appeals of vindictive prosecution claims are likely to be developed. These decisions in the other circuits can serve either to guide the Ninth Circuit in refining or reconsidering its rule or to present a true factual and conceptual conflict for later decision by the Court.

Indeed, because it is early in the evolution of vindictive prosecution, the range of Government conduct which should be deemed vindictive and, therefore, impermissible has hardly been explored. This case, for example, is one of only two vindictive prosecution cases known to counsel in which an explicit threat was made and later executed.[9] As the variety of factual circumstances surrounding claims of vindictive prosecution begins to appear, meaningful distinctions among the claims will become apparent to the courts of appeals concerning the appropriateness of pretrial appeals, as acknowledged by the Fifth Circuit in *Gregory*.[10]

Justice would be better served if the development of the law follows its natural course to provide the Court a solid predicate on which to decide this most important issue involving fundamental rights and the Constitution. In the meantime, this Court can be comforted in denying certiorari both because the actions of the Government here

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[9]The other case is *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.) *cert. denied*, 434 U.S. 829 (1977).

[10]656 F.2d at 1136. *See also, United States v. Brizendine, supra*, 659 F.2d at 221, wherein the D.C. Circuit notes that "different prosecutorial conduct" and "factual divergences" require different Due Process analysis.

were deplorable and egregious and because the Ninth Circuit has employed a procedural device to handle quickly pretrial vindictive prosecution appeals.

As noted by the Ninth Circuit in this case, petitioner below moved the court of appeal for summary affirmance of the district court on an emergency basis. Pet. 4a-5a. In its appellee's brief in this case, petitioner stated:

> "The Government will note that the procedures it followed in pursuing the Motion for Summary Affirmance . . . have since been recommended by the Clerk of this Court for cases of this kind (Memorandum dated July 7, 1980 to all United States Attorneys for Richard H. Deane, Clerk of Court, copy attached as Exhibit A). *The procedures appear to be a rational and efficient way of preventing interlocutory appeals from causing congestion and delay at the trial court level.*" AB 7. [Emphasis added.]

Attached to the appellee's brief is indeed a memorandum from the clerk of the Ninth Circuit advising prosecutors and defense counsel that the Ninth Circuit "has adopted internal procedures for assuring expedited treatment of *Abney* [*v. United States*, 431 U.S. 651 (1977)] appeals in appropriate cases." AB 21.

Petitioner notes that a panel of the Ninth Circuit in *United States v. Wilson*, 639 F.2d 500, 502 n.1 (1981) recited processing thirteen *Griffin* appeals during the summer of 1980.[11] The summary affirmance procedure adopted by the circuit since then, however, has certainly substantially reduced the congestion and delays from *Griffin* appeals. Accordingly, this Court cannot safely assume that the disruption alleged by petitioner currently exists.

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[11]The Wilson panel continued: "Few appeared to have any merit." 639 F.2d at 502 n.1. This case was "processed" during the summer of 1980 and is one of those few the Ninth Circuit found meritorious.

4. The facts here demonstrate clear prosecutorial vindictiveness. Petitioner's cavalier assertion (Pet. 18 n.13) that malice or vindictiveness could not possibly be inferred in this case ignores both the facts of this case and the facts of life for criminal defendants. The court of appeals found that the superseding indictment was the execution of an express threat (Pet. 9a), malicious and vindictive virtually by definition. The vindictive superseding indictment nearly doubled respondents' sentencing exposure.

But apart from tallying potential prison terms and fines,[12] the threat itself manifested an impermissible abuse of the prosecution's broad powers, *an abuse specifically intended to disadvantage the defendant*. Both the district court and the court of appeals recognized the disadvantages to respondents inherent in the superseding indictment — even after some counts were dismissed. ER 129-130; Pet. 8a-9a. For three new counts remained even after the "voluntary" dismissal while before changing venue there had been two. Indeed, the three remaining counts disadvantaged respondents because the likelihood of conviction was increased both because of the quality of the evidence to be applied to the new indictment and because respondents now have three ways to "lose" at trial.

Petitioners argument that the dismissal of the conspiracy count benefited respondents (Pet. 18 n.13) also ignores the undisputed facts. While conspiracy is undoubtedly a powerful charge, the conspiracy count in this case was so badly drawn that both the district court and the prosecutor took

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[12]The Government characterized "upping the ante" to the district court as more than "the time in jail." The Government said the "ante" is "the burden on the defendant, the time in jail, the burden of litigation, all the burdens attendant on the defendant." ER 128.

special note of it.[13] ER 76, 129; Pet. 18a; App. A, *infra* at 11a. The conspiracy charge very probably is fatally defective and would have been dismissed in any event.

Finally, petitioner again departs from the facts in its bald assertion that "what the court of appeals characterized as a vindictive 'threat' was in reality only a candid disclosure to respondents." Pet. 18 n.13. Neither the Kentucky prosecutor nor the Customs agent said anything to respondents about charges "which could not be brought in the Eastern District of Kentucky."[14] While petitioner would, of course, prefer now to characterize its threat as a "candid disclosure," it admitted the threat before both the district court and the court of appeals. It is too late to try to challenge the terms of the threat or that is was a threat at all.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS G. SIMON,
THOMAS R. SHERIDAN,
SIMON & SHERIDAN,

Attorneys for Respondents,
Hollywood Motor Car Company, Inc.
and Fredric Michael Bernstein.

February, 1982.

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[13]Indeed the "needlessly complicated" conspiracy count was the California prosecutor's claimed motivation for superseding the indictment so as to "simplify the case . . . for everyone". Pet. 18a. It certainly simplified the case for the Government.

[14]The Government filed no counteraffidavit to challenge the terms of the remark as proved by respondents and admitted by the prosecutor. ER 97-98, 134.

Appendix

APPENDIX A.

Emergency Motion for Summary Affirmance of District Court; Declaration; Proposed Order.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Hollywood Motor Car Co. Inc., et al., Defendants-Appellants. C.A. No. _____, DC No. CR 80-299(A)-LEW

Filed: June 26, 1980.

Plaintiff-appellee United States of America hereby moves this Court, on an emergency basis, to summarily affirm the District Court's order dated June 10, 1980, denying the joint motion of defendants to dismiss the superseding indictment on grounds of vindictive prosecution.

Trial in the District Court, originally set for June 17, 1980 and now reset for July 29, 1980, is stayed and cannot proceed until this Court reviews the District Court's denial of the vindictive prosecution motion. Plaintiff-appellee therefore requests that this Court rule on this emergency motion on or before July 22, 1980, to allow trial to proceed on July 29, 1980 as presently set.

Respectfully submitted,

ANDREA SHERIDAN ORDIN
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/Molly Munger
MOLLY MUNGER
Assistant United States Attorney

Attorneys for Plaintiff-Appellee
United States of America

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I.
ISSUE PRESENTED

The issue to be decided on this motion is whether the District Court was correct to deny defendants' joint motion to dismiss the superseding indictment on grounds of vindictive prosecution.

II.
STATEMENT OF THE CASE AND STATEMENT OF PROCEEDINGS BELOW

The Court is respectfully referred to the annexed Declaration of Molly Munger which sets forth all relevant proceedings below, and which attaches as exhibits all pleadings relevant to review.

III.
JURISDICTION

This Court has jurisdiction to review prior to trial a District Court's denial of a defendant's motion to dismiss for vindictive prosecution. *United States v. Griffin*, _____ F.2d _____, slip op. 2225, 2226-2229 (9th Cir. March 6, 1980).

IV.
ARGUMENT

A. BACKGROUND

This case was originally instituted in the Eastern District of Kentucky. It was transferred to the Central District of California by means of a motion brought by defendants pursuant to Federal Rule of Criminal Procedure 22(b) (Ex. B).[1]

The original indictment filed in Kentucky set forth two counts, a conspiracy count (18 U.S.C. §371) and a smuggling count (18 U.S.C. §545). The conspiracy count alleged as overt acts four false statements to Customs, in violation of 18 U.S.C. §542, in connection with four different Ferrari automobiles. The smuggling count alleged the wrongful receipt and transportation of one of these vehicles. (Ex. A).

1. The Conspiracy Count.

Following the transfer of the case, the United States Attorneys Office in the Central District filed a superseding indictment which added as substantive counts (18 U.S.C. §542) the four false statements which had previously been alleged as overt acts in the conspiracy count. (Ex. D). The Government then obtained the dismissal of the conspiracy count. (Ex. E).

Defendants made their first appearance before the trial court in the Central District on April 21, 1980, (Ex. B). The superseding indictment was filed on April 25, 1980, (Ex. D). The conspiracy count was dismissed on May 8, 1980. (Ex. E).

At the same time it obtained the dismissal of the conspiracy count, the Government also obtained the dismissal

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[1]The exhibits referred to in this section are the exhibits attached to the Declaration filed herewith.

of two of the newly-added subsantive counts. (Ex. E). In sum, the conspiracy count was first replaced by the substantive counts that it included, then two of the substantive offenses were dismissed.

No new facts or transactions were included following the changes which had not been included in the original indictment. Two of the four vehicle transactions which had originally been at issue were deleted. The dismissed conspiracy count carried a penalty of 5 years. The two new false statements counts carried a combined penalty of 4 years. 18 U.S.C. §371; 18 U.S.C. §542.

2. The Smuggling Count.

In the superseding indictment, the Government retained the smuggling count originally alleged in the Kentucky indictment. (Ex. A; Ex. D). For venue purposes, it changed the wording slightly to reflect the fact that the subject vehicle was wrongfully imported — as opposed to wrongfully transported and received — in the Central District.

Section 545 outlaws both illegal importation of merchandise and the transportation and receipt of merchandise which has been illegally imported. Illegal importation was thus an element of the §545 charge as it appeared in the original indictment. The amendment dropped the charges of transportation and receipt which had been included in the original charge.

3. The Motion For Vindictive Prosecution.

On May 20, the defendants filed a motion to dismiss the superseding indictment for vindictive prosecution. They asserted that they had been told before the transfer that "new counts or indictments" based on "other Customs violations" would be added to the original indictment if the matter were transferred. They did not allege that any new facts or transactions were in fact charged in the new in-

dictment, nor did they claim they had been prejudiced by the new indictment. (Ex. F; Ex. G).

Judge Waters denied the vindictive prosecution motion. Prior to the hearing, the Government had filed a declaration explaining that its only motive in making the changes it had made had been to pare down and simplify a relatively straight-foward case which had arrived in the Central District in a needlessly complex form. (Ex. H). The declaration was uncontroverted. At the hearing, defendants expressly declined to claim that the Government had had a vindictive motive in taking the steps it had taken. (Ex. I at p. 9). The Court found that no vindictive motive was present (Ex. I at p. 24).

B. THE DISTRICT COURT'S RULING WAS CORRECT

1. The Charges Were Not Increased.

When a defendant's exercise of a procedural right — such as the right to transfer — is met with an increase in charges against him, the Government may be required to prove that the increase in the charges was not motivated by vindictiveness. *United States v. Burt*, _____F.2d _____, slip op. 3423, 3429 (9th Cir. May 27, 1980). If the Government does not meet this burden, the matter may be dismissed, *United States v. Groves*, 571 F.2d 450, 452-455 (9th Cir. 1979); *United States v. Demarco*, 550 F.2d 1224 (9th Cir. 1977), *cert. denied*, 434 U.S. 827; *United States v. Ruesaga-Martinez*, 434 F.2d 1367, 1369-70 (9th Cir. 1976). This is the "vindictive prosecution" rule which defendants sought to invoke.

In this case, however, defendants' exercise of their right to transfer had been met with a *decrease* in the charges against them. This Court has made clear that a motion for

vindictive prosecution does not lie under these circumstances:

> "This Circuit has refused to find the actions of the prosecutor in re-indicting a defendant vindictive where the charges contained in the second indictment expose the defendant to no greater risk of punishment than did those contained in the first indictment."

United States v. Rosales-Lopez, _____F.2d _____, slip op. 2394, 2403 (9th Cir. March 20, 1980). *See also United States v. Snell*, 592 F.2d 1083 (9th Cir. 1979).

Here, defendants' "risk of punishment" was reduced from a total of ten years to a total of nine years after the matter was transferred. The motion was without merit on its face.

2. The Rosales-Lopez Rule Is Correct.

The Court is correct to summarily reject vindictive prosecution claims where there has been no increase in defendant's sentencing exposure. Increasing charges after a defendant exercises a procedural right may chill the defendant's exercise of his rights or the exercise of rights by others. *Demarco, supra,* at 1327. Thus, the Government may properly be required to "dispel" the appearance of vindictiveness by demonstrating that its actions were "justified by independent reasons or intervening circumstances." *United States v. Griffin*, _____ F.2d _____, slip op. 2225, 2230 (9th Cir. March 6, 1980).

Where, as here, a defendant's exercise of his rights has not been penalized — but in fact rewarded — no reason appears for requiring the Government to prove the absence of a vindictive motive. The defendant has been encouraged to exercise his rights, not discouraged. There is no chilling "appearance of vindictiveness" to dispel.

3. The Alleged Threat Is Unavailing.

Defendants claim that the addition of new counts was threatened prior to the transfer. If such a threat was made in the Eastern District of Kentucky, it was never followed up in the Central District. Instead of adding "new counts" based on "other Customs violations", the United States Attorneys office in the Central District deleted two of the four original transactions from the case. It reduced both the offenses with which defendants were charged and their sentencing exposure.

A threat to respond to a transfer by increasing charges, followed by an increase in charges as threatened, was held in *Demarco, supra,* to give rise to the appearance of vindictiveness. 550 F.2d at 1226-1228. But when such a threat is followed by behavior which instead rewards the transfer, it cannot reasonably appear to the defendants or anyone else that the government is acting vindictively or punishing the exercise of rights.

4. The Government Did Not Act Vindictively.

Even if the Government were held obliged to refute the existance of a vindictive motive in this case, the Government met this burden. The trial Court held that the United States Attorneys office in the Central District had had no vindictive motive in changing the form of the case. The nature of the actions themselves refuted the presence of vindictiveness. In addition, the uncontroverted declaration established that the steps taken were taken solely for the purpose of simplifying a needlessly complicated out-of-district matter.

Where the Government proves the absence of actual vindictiveness, a vindictive prosecution motion should not be granted, even if the case is believed to present the appearance of vindictiveness. *Burt, supra.*

5. Defendant's Proposed Rule Should Be Rejected.

Defendant's motion can only be understood as a request that the Court adopt a new rule: When another district suggests that new counts may be added after a transfer, the Central District is thereafter forbidden to amend the case, on pain of dismissal, even if the proposed amendments reduce the offenses charged and the sentencing exposure, and even if no vindictive motive is present.

This is a ridiculous rule. Second thoughts or new developments often lead to the amendment of original indictments in their home districts. Under the proposed rule, once a case were transferred it could not be amended if the home district had mentioned the possibility of new charges after the transfer. The prudent course in the Central District would be never to seek amendment of transferred matters because the U.S. Attorneys office here would have scant information as to what remarks had been made in the original district.

By freezing transferred cases into their original form, the rule would do what this Court has deplored — penalize defendants for the exercise of their procedural rights. Even helpful modifications — as in this case — would become unlikely following transfer to the Central District.

Trial courts in the Central District would also suffer by being saddled with cumbersome indictments which could not be brought into line with Central District practice. As Judge Waters remarked in reviewing the original eleven-page conspiracy count in this case:

> "I think the Eastern District of Kentucky really doesn't have the background or experience that this District has . . . I think you probably have more experience here in the drafting of indictments." (Ex. I at 18).

In any event, a rule establishing an irrebutable presumption of vindictiveness in some cases has been rejected by this Court. *Burt, supra,* and *Griffin, supra.* These cases establish that even conduct giving rise to a strong appearance of vindictiveness does not establish vindictiveness *per se.* In all cases, an appearance of vindictiveness may be rebutted by the Government by a demonstration, as was made here, that its actions "were justified by an independent reason or intervening circumstances:"

> "It is now well established that the mere appearance of vindictiveness may give rise to a presumption of vindictive motive sufficient to establish due process violations." See *United States v. Groves,* 571 F.2d 490 (9th Cir. 1978).
>
> *"The inquiry does not end, however, merely upon the demonstration of facts sufficient to give rise to the presumption. Instead, the burden is shifted to the prosecutor to show that his decisions were justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness."* *Griffin, supra,* slip op. at 2230. (Emphasis added). See also *Burt, supra,* at 3249.

6. Defendants Have Shown No Prejudice.

Finally, defendants' motion was without merit for lack of any showing of prejudice. Defendants have never argued, nor could they, that they have been prejudiced by the reduction of the charges against them. They ask the Court to establish a technicality by means of which the superseding indictment could be quashed in the absence of any harm to them. The request should be denied. *See United States v. Jernigan,* 582 F.2d 1211 (9th Cir. 1978); *United States v. Simmons,* 556 F.2d 827 (9th Cir. 1976) (indictment should not be dismissed in the absence of substantial prejudice to defendant).

V.
CONCLUSION

For all the reasons stated herein, the Court's denial of defendants' vindictive prosecution motion should be affirmed. The matter should be affirmed summarily to avoid any prejudice by further unnecessary delay of the trial. The Government respectfully moves for an order summarily affirming the District Court, for an order that the Court's mandate shall issue immediately pursuant to Federal Rules of Appellate Procedure 41(a), and for an order that the filing of a petition for rehearing by the defendants will not stay the mandate.

Since trial is presently set for July 29, 1980, the Government respectfully requests this Court to issue its judgment by July 22, 1980, with the provisions requested above, so that in the event the judgment of the District Court is affirmed, the District Court will immediately regain jurisdiction over the case and will be able to proceed to try this case on July 29, 1980 as presently scheduled.

Respectfully submitted,

ANDREA SHERIDAN ORDIN
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/Molly Munger
MOLLY MUNGER
Assistant United States Attorney

Attorneys for Plaintiff-Appellee,
United States of America

DECLARATION OF MOLLY MUNGER

I, Molly Munger, declare and state as follows:

1. I am the Assistant United States Attorney assigned responsibility for the case of *United States v. Hollywood Motor Car, Inc.*, CR 299(A) on the files of the United States District Court for the Central District of California. The trial in the matter was originally scheduled for June 17, 1980. It has now been rescheduled for July 29, 1980.

2. The original indictment in this case was filed on December 19, 1979 in the United States District Court for the Eastern District of Kentucky. A copy of the original indictment is attached hereto as Exhibit A.

3. Pursuant to a motion by the defendants under Federal Rule of Criminal Procedure 21(b), the case was transferred to the Central District of California. The file arrived in the Central District in early April, 1980. The parties first appeared in the Central District for trial-setting on April 21, 1980. (See Clerk's Memo dated 4-9-80 attached as Exhibit B; Minute Order dated April 21, 1980, attached as Exhibit C).

4. On April 25, 1980, I appeared before the grand jury in the Central District with the case agent in this matter and sought and obtained the First Superseding Indictment. That Indictment is attached hereto as Exhibit D.

5. On May 6, 1980, having advised both the Court and defendants earlier of my intention to do so, I filed a motion to desmiss [sic] Counts 1, 5 and 6 of the First Superseding Indictment. A copy of the Government's Motion to Dismiss is attached hereto as Exhibit E. The Court granted the motion on May 8, 1980, as is indicated by the signed order attached to the motion.

6. On May 20, 1980, defendants filed a motion to dismiss the indictment and a supporting affidivit [sic] by James

Hartke. These documents are attached hereto as Exhibits F and G, respectively.

7. The Government responded to and opposed the motion to dismiss on May 23, 1980. The Government's opposition papers are attached hereto as Exhibit H. They include a declaration by myself which sets forth the reasons for the superseding indictment and the subsequent dismissals, and the effects of those actions.

8. On June 2, 1980, the motion to dismiss was heard by the Honorable Laughlin E. Waters, Judge of the United States District Court for the Central District of California. The transcript of that hearing is attached hereto as Exhibit I.

9. On June 4, 1980, I filed with the District Court a supplemental memorandum bringing to the Court's attention the Ninth Circuit's recent opinion in the case of *United States v. Burt*, _____F.2d _____slip op. 3423 (9th Cir. May 27, 1980). A copy of the supplemental memorandum is attached hereto as Exhibit J.

10. On June 10, 1980, Judge Waters denied the defendants motion to dismiss the indictment. The Court's order is attached as Exhibit K.

11. Trial has been reset in this matter for July 29, 1980. It was originally scheduled for June 17, 1980 but that date was vacated when defendants filed their notices of appeal from the Court's order of June 10. The July 29 date already represents a seven-month delay from the date of the original indictment. The Government would hope to prevent any further delay by adhering to that trial date.

12. This case involves two to four out-of-state witnesses, at least one of them an expert, who must be brought to the Central District to testify. One week's notice is necessary to arrange for their transportation, lodging, etc. Thus,

the trial cannot proceed on July 29 unless the Court rules before July 22, 1980 on the motion for summary affirmance.

13. No relief has previously been sought by any party on this appeal. All of the defendants are on bond. Appellants Counsel are:

Thomas R. Sheridan
Douglas B. Simon [sic]
2404 Wilshire Blvd.
Los Angeles, California 90097
Tel: (213) 380-3330

For defendants Frederic M. Bernstein and Hollywood Motor Car Co. Inc.

Philip Deitch
4th Floor
10850 Wilshire Blvd.
Los Angeles, California 90024
(213) 879-9273

For defendant Terance Quatkemeyer, aka Terry Quinn.

14. All facts in support of this motion were submitted to the District Court. I notified both defense counsel by telephone on June 23, 1980 of the Government's intention to file this motion on or before June 26 and to seek a ruling on or before July 22, 1980. I had previously advised them of my intention to file the motion as soon as the reporter's transcript was prepared.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of June, 1980.

/s/ Molly Munger
MOLLY MUNGER

Order Granting Motion for Summary Affirmance

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Hollywood Motor Car Co. Inc., et al., Defendants-Appellants. C.A. No. _____ , U.S.D.C. No. CR 80-299(A)-LEW.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the Government's motion for summary affirmance of the District Court's order denying defendants' motion to dismiss the indictment is hereby granted. The mandate shall issue immediately and any petition for rehearing as may be filed will not stay the mandate.

DATED: This _____day of July, 1980.

[unsigned]

UNITED STATES CIRCUIT JUDGE

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1144

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

HOLLYWOOD MOTOR CAR COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In opposing our petition, respondents have made no attempt to demonstrate why district court orders denying motions to dismiss indictments on grounds of prosecutorial vindictiveness fall within the small class of rulings that are immediately appealable under the "collateral order" exception to the final judgment rule (see *Carroll* v. *United States*, 354 U.S. 394, 403 (1957) ("[t]he instances in criminal cases" when collateral order appeals will be allowed "are very few")). Absent from their response is any explanation why the general due process right that respondents assert entails an absolute immunity from trial (compare *Abney* v. *United States*, 431 U.S. 651 (1977)) or why post-conviction relief would be inadequate to redress any constitutional violation that might exist. Similarly, respondents have failed to suggest any reason why this case is different from the long line of criminal cases (see Pet. 14-15) in which this Court has forbidden interlocutory review. In short, respondents have

offered no legal basis to support the propriety of the decision below. Moreover, they appear to acknowledge the correctness of our assertion that "appealability is an important element in the administration of the federal law" (Opp. 5).

Respondents nonetheless argue that the petition should be denied because the government failed to preserve the appealability issue in the courts below (Opp. 5-8) and because there is no genuine conflict in the circuits on this jurisdictional question (Opp. 8-13). There is no merit to either of these claims.

1. Respondents criticize the government for failing to argue either in the district court or before the panel of the court of appeals that the district court's order was not subject to an interlocutory appeal. They characterize the government's challenge to their interlocutory appeal through a petition for rehearing en banc as an "eleventh hour" change in position (Opp. 8). This line of argument, however, completely ignores the fact that the law of the circuit—which bound the government before both the district court and the panel of the court of appeals—expressly permitted interlocutory appeals. The first opportunity for challenging the law of the circuit was the government's petition for rehearing en banc.

The order of the district court denying respondents' motion to dismiss the indictment on grounds of prosecutorial vindictiveness (Pet. App. 15a) was entered only weeks after the Ninth Circuit handed down its decisions in *United States* v. *Griffin*, 617 F. 2d 1342 (9th Cir. 1980), and *United States* v. *Burt*, 619 F. 2d 831 (9th Cir. 1980).[1] Those recent

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[1]The order of the district court in this case was entered on June 10, 1980. *Griffin* was handed down on March 6, 1980. *Burt* was handed down on May 27, 1980.

decisions of the court of appeals established unequivocally that orders such as the district court's order in this case were subject to immediate appeal. Accordingly, under the prevailing law in the Ninth Circuit, respondents had an unquestionable right to prosecute an interlocutory appeal.

The government was legally precluded from challenging the *Griffin* doctrine before either the district court or the panel of the court of appeals. It is a well established rule in the Ninth Circuit that the decisions of the court are binding on future panels—and, of course, on district courts within the circuit—in the absence of en banc consideration and reversal. See, *e.g.*, *United States* v. *Jenson*, 450 F. 2d 1258, 1264 (9th Cir. 1971); *United States* v. *Mount*, 438 F. 2d 1072, 1073-1074 (9th Cir. 1970); *Ellis* v. *Carter*, 291 F. 2d 270, 273 n.3 (9th Cir. 1961). Accordingly, any government challenge to *Griffin* was required to be directed in the first instance to the en banc court and not to the panel on appeal. See *Long* v. *Bureau of Economic Analysis*, 646 F. 2d 1310, 1320 (9th Cir. 1981); *United States* v. *Wilson*, 639 F. 2d 500, 502 (9th Cir. 1981) (any challenge to the doctrine of *Griffin* "must be addressed to the court *en banc*. This panel is bound by *Griffin*").

After the decision of the panel in this case, the government followed the Ninth Circuit's directive in *Wilson* and challenged the validity of the *Griffin* doctrine in a petition for rehearing en banc. It also supplied the en banc court with copies of the decisions of other circuits that had rejected the *Griffin* doctrine (see Pet. 6). As the Ninth Circuit's case law makes clear, this was the only appropriate vehicle for raising the jurisdictional issue, and it was sufficient to preserve the claim for this Court's consideration.[2]

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[2]Moreover, it is fundamental that when appellate jurisdiction is lacking, that jurisdiction cannot be supplied by waiver or acquiescence of the parties. Lack of jurisdiction may be asserted at any stage of the proceedings.

Finally, there is no merit to respondent's assertion that the government is now estopped to raise the jurisdictional issue because it urged the panel of the court of appeals to affirm the decision of the district court summarily. The government's memorandum urging the panel to affirm summarily represents no more than its resigned acceptance of the rule in *Griffin* before the panel and its desire to ameliorate, to the extent possible, "the delays and disruptions attendant upon intermediate appeal" in criminal cases (*DiBella* v. *United States*, 369 U.S. 121, 126 (1962)).[3]

2. Respondents also argue (Opp. 8-11) that the conflict that we cite in our petition between the decision below and *United States* v. *Brizendine*, 659 F. 2d 215 (D.C. Cir. 1981), and *United States* v. *Gregory*, 656 F. 2d 1132 (5th Cir. 1981), is "illusory." The ground for this contention is respondents' belief that, in contrast to *Brizendine* and *Gregory*, the "vindictive prosecution" claim asserted in this case is meritorious.[4] However, nothing in this Court's decisions

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[3]Without providing statistical or other support, respondents baldly assert (Opp. 13) that "[t]he summary affirmance procedure adopted by the circuit * * * has certainly substantially reduced the congestion and delays from *Griffin* appeals." While this procedure is clearly preferable to unexpedited interlocutory appeals, the panel in *Wilson, supra*, 639 F. 2d at 502 n.1, correctly explained that "even summary disposition cranks into the life of a district court case several weeks of delay. Delay, disruption of calendars, loss of jury time, and needless expense follow in the wake of these interlocutory appeals." Moreover, when the court of appeals refuses to apply its summary procedures, the delay and disruption is even more significant. In this case, for example, there has been a 20-month delay since the district court's order refusing to dismiss the indictment. Trial has been held in abeyance throughout that entire period.

[4]For the reasons stated in our petition (Pet. 17-18 & n.13) this line of argument is totally without factual support. We find it difficult to conceive of a "vindictive prosecution" claim that rests on a weaker factual foundation than the one in this case.

has ever suggested that the availability of interlocutory review should turn on the merits of the substantive claim asserted. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981) ("interlocutory orders are not appealable 'on the mere ground that they may be erroneous.' "). To the contrary, as this Court unequivocally stated in *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978):

> The Court of Appeals' alternative rationale—that it was the "extraordinary nature" of respondent's claim that merited interlocutory appeal, even though not all speedy trial claims would be so meritorious—is also unpersuasive. "Appeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). The factual circumstances that underlie a speedy trial claim, however "extraordinary," cannot establish its independent appealability prior to trial. Under the controlling jurisdictional statute, 28 U.S.C. § 1291, the federal courts of appeals have power to review only "final decisions," a concept that Congress defined "in terms of categories." *Carroll* v. *United States*, 354 U.S., at 405.

As we have demonstrated in our petition (Pet. 7-8 and n.5), there is a square conflict in the circuits on the important jurisdictional question raised in this case. Thus, the courts of appeals in both *Brizendine* (659 F. 2d at 222) and *Gregory* (656 F. 2d at 1135-1136) have held that vindictiveness claims, even if meritorious, may be adequately redressed on appeal from a final judgment of conviction. Moreover, in *Brizendine*, the District of Columbia Circuit explicitly rejected the Ninth Circuit's *Griffin* doctrine as "erroneous[]," "unpersuasive," and conducive to "pernicious" practical results (659 F. 2d at 220 n.9, 224). Likewise, in *Gregory*, the Fifth Circuit found the rule of immediate appealability prescribed in *Griffin* to be "faulty" (656 F. 2d

at 1136) and refused to follow it.[5] Moreover, as we have pointed out (Pet. 8-9 n.5), both the Fourth Circuit in an unpublished holding and the Third Circuit in dictum have rejected the *Griffin* standard. In view of this marked divergence concerning the jurisdiction of courts of appeals to review "vindictive prosecution" claims on an interlocutory basis, an expeditious resolution of the issue by this Court is appropriate.

3. Finally, respondents suggest that because the issue generating the conflict among the circuits is addressed at length in the opinions of "only" three circuits, the issue presented by this case should not be deemed "ripe" for determination by this Court at the present time (Opp. 11). We most emphatically disagree. Vindictive prosecution claims can be raised, at a minimum, in any case in which there has been a superseding indictment with any change in charges (even, as here, a reduction in penalty exposure). The Ninth Circuit's willingness to permit interlocutory appeals in all such cases, combined with its extraordinarily broad view of what constitutes impermissible vindictive

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[5]Respondents argue (Opp. 10-11) that the decision below is consonant with the holding in *Gregory* since, in the latter case, the Fifth Circuit speculated that a vindictiveness claim might be immediately appealable if there were "substantial evidence that the prosecutor intended to try [the accused] for reasons unrelated to the enforcement of the laws and for the sole purpose of having them go through the psychological and financial burdens of trial, without any reasonable prospect of conviction" (656 F. 2d at 1136). There is absolutely no basis in the record to indicate that the charges here—either those contained in the original indictment or in the superseding indictment—were not supported by probable cause. Indeed, the opinion of the court below expressly acknowledges that respondents are subject to trial on criminal charges arising from their alleged unlawful conduct (see Pet. App. 12a). Thus, although we disagree with this dictum in *Gregory*, it certainly has no applicability in the present circumstances.

prosecution,[6] has had severe adverse consequences.[7] Not only has it introduced substantial delays in large numbers of criminal prosecutions, but it has unquestionably exercised a drastic chilling effect on prosecutors' charging decisions, preventing them from making adjustments in the initial charging decisions in many cases where such adjustments appear to be indicated, because of the almost certain knowledge that such adjustments will cause substantial delay in completing the prosecution. Accordingly, we submit that it is imperative that this Court resolve the question of jurisdiction to entertain interlocutory appeals on vindictive prosecution grounds as expeditiously as possible.

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[6]See, *e.g.*, *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367, 1369-1370 (9th Cir. 1976); *United States* v. *Currie*, 653 F. 2d 1300 (9th Cir. 1981).

[7]There is no basis for respondent's speculation (Opp. 11-12) that the Ninth Circuit may reconsider the *Griffin* rule in light of the contrary positions announced in *Brizendine* and *Gregory*. As pointed out in our petition (Pet. 6), copies of these decisions were furnished to the Ninth Circuit while our petition for rehearing en banc was pending in this case. Despite this, "no judge of the court * * * voted to grant rehearing en banc" (Pet. App. 14a). Accordingly, it is most unlikely that the Ninth Circuit will depart from *Griffin* without this Court's intervention.

[8]Our failure to pursue the issue in this Court sooner is not a reflection of any view that it is not important or that prompt correction of the Ninth Circuit's erroneous holding on the jurisdictional question is not needed. Rather, we did not seek certiorari in cases like *Griffin* and *Burt* because we have prevailed on the merits in those cases.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MARCH 1982

DOJ-1982-03